

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WYNN RESORTS, LIMITED,

Plaintiff,

v.

ATLANTIC-PACIFIC CAPITAL, INC.,

Defendant.

Case No. 2:10-CV-00722-KJD-LRL

ORDER

Presently before the Court is the Motion of Defendant ATLANTIC-PACIFIC CAPITAL, INC. (Defendant, APC) to Dissolve the Interim Stay of Arbitration Proceedings (#12). Plaintiff, WYNN RESORTS, LIMITED (Plaintiff, WYNN) filed an Opposition (#22), to which Defendant filed a Reply (#24). Also before the Court is Defendant's Motion to Compel Arbitration (#13). Plaintiff filed an Opposition (#23). Also before the Court is Defendant's Motion to Dismiss (#14) to which Plaintiff filed a Response in Opposition (#21). Also before the Court is Defendant's Emergency Motion to Vacate Ex Parte Injunction (#33). Plaintiff filed its Response (#34) to which Defendant filed its Reply (#35).

FACTUAL BACKGROUND

The instant action was removed by Defendant to this Court following Plaintiff's filing in state court of a Complaint for Damages and Declaratory Relief (#1). In connection therewith, Plaintiff

1 requested a stay of arbitration proceedings commenced by Defendant to which Defendant filed a
 2 response (#11). The dispute centers around an Agreement dated March 30, 2009 between WYNN
 3 RESORTS, LIMITED and ATLANTIC-PACIFIC CAPITAL, INC. .¹

4 Pursuant to the Agreement, WYNN engaged APC as exclusive global placement agent to
 5 raise equity capital for a formed or to-be-formed Special Purpose Vehicle (S.P.V.) sponsored by
 6 WYNN. The agreement provides that the investment vehicle will be formed and capitalized on
 7 terms acceptable to WYNN for the purpose of acquiring, directly or indirectly, interests in gaming
 8 and hospitality assets or related securities. The agreement further provides that WYNN shall have
 9 the sole right to determine whether to close on equity capital commitments arranged by APC .

10 Pursuant to the terms of the Agreement Section 1(a), it was agreed that:

11 APC will perform the following services in connection with solicitation of
 12 investments:

- 13 (i) assist in preparation of summary material describing the terms of the investments;
- 14 (ii) assist in the preparation of (A) a confidential offering memorandum and (B) other
 15 organizational documents;
- 16 (iii) assist in identifying, contacting and, at Wynn's request, negotiating with institutional
 17 high net worth and other suitable investors who may potentially invest in the
 18 investment vehicle;
- 19 (iv) provide all investors with the Memorandum;
- 20 (v) consult with Wynn as to strategy and tactics for initiating discussions and negotiations
 21 with investors;
- 22 (vi) arrange presentation meetings between investors and Wynn and participate in such
 23 meetings;
- 24 (vii) assist in closing of investments;
- 25 (viii) consult with Wynn as to general market conditions, including advising with respect to
 26 the minimum and maximum amounts of investments;
- (ix) forward to Wynn any requests for additional information by investors and assist Wynn
 in responding to such requests; and
- (x) provide such other services in connection with the private placement as may be mutually
 agreed upon by APC and Wynn.

21 The Agreement further provides in Section 1(b) that Wynn will not retain other sales agents
 22 with respect to soliciting of investors for the purpose of effectuating an investment or engage in
 23 conduct which circumvents the exclusivity and rights granted to APC. The Agreement, Section
 24

25 ¹ A copy of the Agreement may be found at Docket #1-8, Notice of Removal, Wynn Resorts, Limited's
 26 Emergency Motion for Stay of Arbitration Proceedings, Declaration of Matt Maddox in Support of Motion to Stay
 Arbitration, Exhibit B.

1 1(h) requires APC to promptly notify Wynn as to the name of each prospective investor and the
2 amount proposed to be invested by each such prospective investor and that Wynn shall have full
3 discretion to decline to accept any investor proposed by APC.

4 Section 2 of the Agreement provides for a non-refundable retainer payable to APC in the
5 amount of \$100,000, upon execution of the Agreement. Section 2 further provides for a cash
6 placement fee equal of 2% payable to APC on investments made by investors payable when the
7 Investment Vehicle acquires, directly or indirectly, any interest or interests in gaming and
8 hospitality assets or related securities, provided that no placement fee shall be payable with respect
9 to investments made by APC or Wynn (or its subsidiaries, affiliates or directors). Section 2 also
10 provides for a success fee to be paid APC in the form of a warrant convertible into one percent
11 (1.0%) of the equity of the Investment Vehicle. Section 2 also provides for a fee of 1% payable to
12 APC for a period of 12 months from the date of the agreement, if any investor introduced by APC
13 but not known to Wynn prior to its introduction by APC, invests any amount in the next privately-
14 offered Investment Vehicle sponsored by Wynn for the purpose of acquiring, directly or indirectly
15 interests in gaming and hospitality assets or related securities if any (a "Subsequent Investment
16 Vehicle").

17 Section 5(f) provides that the Agreement shall be governed by and construed in accordance
18 with the laws of the State of New York. Section 5(g) provides that any dispute, controversy or
19 claim arising from or relating to the Agreement shall be submitted to and determined by binding
20 arbitration in Las Vegas, Nevada conducted by J.A.M.S., to be conducted pursuant to and in
21 accordance with J.A.M.S.' Streamlined Arbitration Rules and Procedures.

22 Following execution of the Agreement, a draft document captioned "Wynn Acquisition
23 SPV" was prepared and circulated (#16, Exhibit B). This so-called "Executive Summary" is dated
24 April 2009. The cover page describes the Wynn Acquisition SPV as:

25 A Special Purpose Vehicle formed to acquire from a distressed seller a highly valuable
26 portfolio of Las Vegas gaming assets and subsequently enhance their financial performance
through value-added management initiatives and operating expertise.

1 The cover page contains the logos of WYNN RESORTS and ATLANTIC-PACIFIC.

2 Subsequently, it is alleged by APC, a new WYNN RESORTS entity was created by WYNN
3 to raise capital to acquire gaming and hospitality assets in Macau, China (“Wynn Macau”), this, in
4 reference to the Wynn Macau Initial Public Offering (I.P.O.) of October 2009. APC alleges that the
5 Wynn Macau I.P.O. constitutes “an Investment Vehicle” sponsored by WYNN RESORTS within
6 the meaning of the Agreement. APC contends that WYNN breached the Agreement between the
7 parties in failing to pay APC compensation in connection with that offering. On May 3, 2010, APC
8 initiated arbitration proceedings requesting arbitration conducted pursuant to J.A.M.S.’ Streamlined
9 Rules and Arbitration and Procedures.

10 ANALYSIS

11 The parties are in disagreement as to whether the Agreement of March 30, 2009, obligates
12 WYNN to arbitrate APC’s commission claims arising from the Wynn Macau IPO. WYNN claims
13 that the Agreement covers only special purpose vehicles, such as the one proposed in the Executive
14 Summary dated April 2009. WYNN alleges that the impetus for the Agreement were WYNN’s
15 interest in acquiring specific existing distressed gaming properties, and APC’s advice that investors
16 would not be comfortable committing significant sums to a “blind pool” vehicle where the actual
17 projects were not known at the time of the investors commitments. WYNN also contends that the
18 Agreement excludes WYNN’s existing projects and entities, that fund-raising activities of WYNN
19 entities, including subsidiaries and affiliates are also excluded and that APC would only have a
20 right to compensation from funds deposited in the investment vehicle itself. WYNN further argues
21 that because the parties never discussed formation of an investment vehicle for Wynn Macau, and
22 no funding or even formation of an investment vehicle ever occurred for Wynn Macau, no
23 commission would be due in any event.

24 APC counters that the Wynn Macau IPO was created as a method of circumventing APC’s
25 rights to a commission under the agreement. APC also contends that pursuant to the arbitration
26 clause of the Agreement, the Arbitrator is to decide issues of arbitrability. WYNN responds that its

1 agreement to arbitrate under the J.A.M.S' streamlined rules related only the "special purpose
2 vehicle" and even then was limited to disagreement regarding fee provisions and for an amount
3 under \$250,000, thus excluding all other disputes.

4 APPLICABLE LAW

5 A dispute as to whether an arbitration clause in a concededly binding contract applies to a
6 particular type of controversy is for the court, not the arbitrator, to decide. Howsam v. Dean Witter
7 Reynolds, Inc., 537 U.S. 79, 84 (2002). Courts must defer "questions of arbitrability" to the
8 arbitrator where the parties have "clearly and unmistakably" agreed that the arbitrator decide such
9 issues. Howsam, 537 U.S. at 84. A broadly worded arbitration clause may show such agreement.

10 The Agreement, Section 5(g), provides that "any dispute, controversy or claim arising from
11 or relating to this agreement shall be submitted to and determined by binding arbitration." The fact
12 that this clause is contained in Section 5 and the fees and expenses clause is provided in Section 2,
13 weighs against WYNN's argument that the arbitration clause was only to apply to fee disputes and
14 not the entire agreement. However, it is undisputed that the agreement was primarily drafted by
15 APC. WYNN contends it would never have agreed to arbitrate before a single arbitrator a claim
16 against it for up to Thirty-Two Million Dollars, let alone arbitrate such a claim in accordance with
17 Streamlined Arbitration Rules and Procedures.

18 The Federal Arbitration Act, 9 U.S.C. §4, requires the Court to be satisfied that the making
19 of the agreement for arbitration or the failure to comply therewith is not in issue before ordering the
20 parties to proceed to arbitration. It is for the Court to decide whether the arbitration clause in the
21 agreement of March 30, 2009, applies to the present controversy regarding a commission due APC
22 in connection with the Wynn Macau IPO. U.S. Fire Ins. Co. v. National Gypsum Co., 101 F.3d
23 813, (2nd Cir. 1996) (cert. denied 521 U.S. 1120). Arbitrability hinges on whether there is an
24 agreement to arbitrate and, if so, whether the dispute falls within the agreement.

1 ISSUES BEFORE THE COURT

2 I. Is there an agreement between the parties to arbitrate?

3 It is clear that the parties agreed to arbitrate certain claims that might arise between them in
4 connection with the performance of the Agreement of March 30, 2009. The arbitration clause is not
5 ambiguous as it pertains to the parties bound by the Agreement. The arbitration clause is contained
6 within its own paragraph, separate from the compensation clause. This is not to say, however, that
7 agreement clearly applies to the controversy between the parties over the Wynn Macau IPO.

8 II. Does the dispute over the Wynn Macau IPO fall within the agreement to arbitrate?

9 WYNN argues that Wynn Macau was a pre-existing entity specifically excepted from the
10 terms of the agreement. Indeed, the Agreement in its first paragraph, refers to “a formed or to be
11 formed special purpose vehicle.” Use of the singular suggests that some specific investment was
12 then being contemplated. The second sentence of the agreement describes the purpose of acquiring,
13 directly or indirectly, interests in gaming and hospitality assets or related securities. The third
14 sentence provides that “Wynn shall have the sole right to determine whether to close on equity
15 capital commitments arranged by APC”.

16 ANALYSIS

17 WYNN argues convincingly that the documentation for the WYNN Acquisition SPV
18 prepared April 2009 demonstrates that the Agreement contemplated acquisition of existing distressed
19 Las Vegas, Nevada properties. APC contends that the agreement is broadly worded and can be
20 construed to include the Wynn Macau IPO. However, the lack of APC’s participation in summary
21 material or a confidential offering memorandum for the Wynn Macau IPO, and the absence of
22 evidence of APC’s performance of any of the other duties incumbent upon it pursuant to the
23 Agreement is troubling.

24 The fact that Wynn Macau opened September 6, 2006 without any apparent participation
25 from APC supports the conclusion that it was an existing WYNN entity, not one to be acquired by a
26 Special Purpose Vehicle as contemplated by the Agreement. The lack of documentation showing

1 that APC notified WYNN of the name of each prospective investor in Wynn Macau and the amount
2 proposed to be invested by each prospective investor as required by Section 1(h) is also troubling.
3 The fact that WYNN has the full discretion to decline to accept any such investor proposed by APC,
4 further weighs against the claim that the dispute is one which WYNN agreed to arbitrate.

5 The exhibits submitted by APC in Volumes 1-5, do not support APC's contention that it
6 considered Wynn Macau another Special Purpose Vehicle. In fact, the only provision in the
7 Agreement for a "subsequent investment vehicle" is contained at Section 2(d) which provides a
8 commission for investors not known to WYNN prior to their introduction by APC who invest in a
9 "subsequent investment vehicle".

10 Absent from the record is any evidence that investors in the Wynn Macau IPO were
11 introduced by APC pursuant to the Agreement. Indeed, Exhibits 3-17 of APC's Exhibit Appendix
12 contain only references to the SPV described in the April 2009 Executive Summary. Specifically,
13 Exhibit 3, consisting of Pages 1-7, captioned "Project Dixie", refers to properties A, B and C,
14 consistent with the description contained in the Executive Summary for the three distressed
15 properties to be acquired in connection with the WYNN Acquisition SPV Executive Summary of
16 April 2009. Exhibit 4, dated April 20, 2009, refers to "Named Properties" making it clear that the
17 document relates to the distressed properties intended as the Wynn Acquisition S.P.V. Exhibit 5,
18 dated April 23, 2009, refers to investors A, B and C under the subject line "Project Dixie". Exhibit
19 5, dated April 27, 2009, is also related to "Project Dixie". Thus, it is clear that "Project Dixie" and
20 Exhibits 3-7 relate to APC's responsibilities in connection with the Agreement and the Wynn
21 Acquisition SPV. Exhibit 8 is a Proposed Operating Agreement of WYNN Recovery Partners
22 showing a proposed investment by Investor A of \$100,000. Exhibit 8 is dated August 21, 2009 and
23 appears to be a follow-up discussion to formation of WYNN Recovery Partners to be formed for the
24 purposes of identifying investment opportunities in the discounted or distressed debt of gaming and
25 hospitality companies. Exhibit Appendix 11 is a Cayman Islands search report showing formation of
26 Wynn Macau, Ltd. on September 4, 2009. The remainder of APC's exhibits consist almost entirely

1 of the Wynn Macau Global Offering and reporting forms, which do not reflect any involvement by
2 APC in the Wynn Macau IPO.

3 It is apparent from the exhibits that the parties, pursuant to the terms of the Agreement, were
4 discussing a single venture, the Wynn Acquisition SPV, to acquire specific distressed gaming
5 properties. The Wynn-A Recovery Partners (Exhibit Appendix #8) was a proposed Nevada limited
6 liability company, to be formed for the purpose of identifying and acquiring distressed loan or debt
7 securities or targeted gaming and hospitality companies with the intention of ultimately gaining
8 control of the targeted company. Thus, the proposed entity, Wynn-A Recovery Partners, LLC, would
9 become the entity for acquiring the three distressed gaming properties contemplated in the Wynn
10 Acquisition SPV and the Agreement.

11 The absence of evidence of any involvement by APC in any other Wynn Special Purpose
12 Vehicle further supports the conclusion that the parties never intended that a listing of shares by an
13 existing or even newly formed and indirect subsidiary of WYNN RESORTS would obligate WYNN
14 to pay a commission to APC. The congratulatory e-mail of November 20, 2009 from James Manley,
15 Chairman of APC to Matt Maddox of WYNN (#16-3) supports the conclusion that the commission
16 claim is an afterthought. In that correspondence Mr. Manley offers his congratulation on the public
17 offering in Macau:

18 It's really a tremendous vote of confidence in **your** (emphasis added) organization.
19 We understand that your receipt of money from the offering means you are not going
20 forward, at least for now, with **the other funds** (emphasis added) we had raised for
21 you. But we should get together and talk about what to say to our investors and how
22 to keep them warm. After all, you never know what deals may come your way and
23 it's certainly a shame to let go of what was over \$3B in circles.

24 Nowhere is there a suggestion of involvement by APC in raising funds for the Wynn Macau IPO, or
25 a commission claim, only an acknowledgment that WYNN would not now need the funds for the
26 SPV and acquisition of the distressed properties previously identified.

 The Wynn Macau IPO Global Offering documentation (#24, Exhibit Appendix, Ex. #12)
submitted by Defendant APC with its Reply (#24), raises issues not addressed by the parties. Wynn

1 Resorts Macau (WRM), Wynn Macau, Limited and Wynn Resorts, Limited are separate entities.
2 “Our company is currently an indirect subsidiary of Wynn Resorts, Limited.” (#24, Ex. 12, page
3 105). After the IPO, Wynn Macau, Limited (Cayman Islands) would continue as a separate company
4 entirely dependent on the income from a single property, Wynn Macau (#24 Exhibit 12, p. 5). Also,
5 WRM is required to have an executive director who is a Macau permanent resident and holds at least
6 10% of the voting shares and capital in WRM. The corporate structure following the IPO reflects the
7 interests of Mr. Wong Chi Sen in that capacity. (#24, Ex. 12, p 75). The IPO disclosures include the
8 fees and commissions payable from proceeds (#24, Ex. 12, p 10). The Offering does not disclose
9 any fees or commissions payable to APC. It is not contended that either WRM or Wynn Macau
10 Limited are party to the Agreement. While a non-signatory may be compelled to arbitrate if it is so
11 dominated that it is appropriate to pierce the signatory’s corporate veil, there is no evidence before
12 the Court to compel arbitration under a veil piercing argument. Fisser v. Int’l Bank, 282 F.2d 231,
13 234-35 (2nd Cir. 1960).

14 APC’s contention that it is entitled to a commission from the Wynn Macau, IPO also
15 implicates the rights of Wong Chi Seng and other shareholders and purchasers of the IPO who were
16 not informed through the offering literature and disclosures that such would be the case. Separate
17 identities of parent corporation and its subsidiary, even wholly owned subsidiary, should not be
18 disregarded unless recognition of their separateness, under the circumstances would sanction a fraud
19 or promote injustice. Royal Indust. v. St. Regis Paper Co., 420 F.2d 449, 453 (9th Cir. 1969); see
20 also, Rep. of Nicar. v. Standard Fruit Co., 937 F.2d 469, 480 (9th Cir. 1991)(question of whether a
21 subsidiary of a corporation which signed a “Memorandum of Intent” is bound by an arbitration
22 clause is for the court rather than arbitrator).

23 CONCLUSION

24 The Wynn Macau IPO was a stock sale by an independent subsidiary, not an “acquisition” by
25 Plaintiff WYNN RESORTS, LIMITED. The Agreement of WYNN RESORTS LIMITED to
26 arbitrate certain disputes arising from the Agreement dated March 30, 2009, cannot be construed to

1 entitle APC to a commission for the Wynn Macau IPO. The Agreement specifically excludes
2 investments made by WYNN or its subsidiaries, affiliates, officers and directors. It is undisputed
3 that APC had nothing to do with the Wynn Macau Ltd. and that neither the company nor its investors
4 are parties to the Agreement. Wynn Macau, Ltd., IPO and its shareholders would be potentially
5 harmed by any arbitration decision imposing liability for a commission. The Agreement and its
6 arbitration clause have not been shown to “clearly apply” to the Wynn Macau IPO.

7 Accordingly, IT IS HEREBY ORDERED that Defendant’s Motion to Dissolve Interim Stay
8 of Arbitration Proceedings (#12) is **DENIED**;

9 IT IS FURTHER ORDERED that Defendant’s Motion to Compel Arbitration (#13) is
10 **DENIED**;

11 IT IS FURTHER ORDERED that Defendant’s Motion to Vacate Ex Parte Injunction (#33) is
12 **DENIED**;

13 IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss (#14) is **DENIED**.

14 DATED this 25th day of March 2011.

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Kent J. Dawson
United States District Judge